

## The President's Day in Court: How The Supreme Court Checks Executive Power

Devon Gill  
Political Science  
The University of North Carolina at Asheville  
One University Heights  
Asheville, North Carolina 28804 USA

Faculty Advisors: Dr. Peter Haschke and Dr. Ashley Moraguez

### Abstract

Scholars have long studied how the Supreme Court and individual justices make decisions, particularly in cases involving the President of the United States. Existing literature often concentrates on either internal or external factors and the subsequent impact on the Court's decision-making, while few scholars examine both Court-specific and contemporary issues for an all-inclusive analysis. I seek to identify which factors influence judicial decision-making in cases involving the president, and I advance existing theories by evaluating both political ideology and the effects of wartime along with issue-based controls. Justices should be more likely to defer to the president in cases heard during wartime and when sharing political ideology with the sitting president. I evaluate this claim with data on Supreme Court cases regarding presidential power between the years 1933 and 2008 as provided by Howell and Ahmed (2014) and find substantive support concerning an increase in deference to the president.

### 1. Introduction

In response to the Japanese attack on Pearl Harbor in 1941, Franklin D. Roosevelt issued Executive Order 9066, which authorized the subsequent internment of all individuals—citizen or noncitizen—of Japanese descent.<sup>1</sup> Though the Department of Justice, along with members of Congress, challenged its constitutionality and fundamental racial and ethical issues, the U.S. Army enforced the order. Shortly thereafter, *Korematsu v. The United States* became a landmark case for presidential power—war power, more specifically—as the Supreme Court defended Roosevelt's use of “martial necessity arising from the danger of espionage and sabotage” and ultimately upheld the order.<sup>2</sup> The Supreme Court has heard a number of cases challenging the expansion of presidential power, though there seems to be a lack of consistency in their rulings. The Court justified Japanese internment by the thousands in *Korematsu* as a necessity for preserving national security, though the Court showed less forbearance to a known associate of Osama bin Laden in the later case of *Hamdan v. Rumsfeld*.

In the case of *Hamdan*, Osama bin Laden's former chauffeur was captured, imprisoned, and nearly tried before a military commission established by President George W. Bush as part of the War on Terror.<sup>3</sup> The Supreme Court ruled that the military commission was outside executive jurisdiction and that the President had no inherent power to establish the tribunal relating to presidential war power as dictated by the Constitution. Other cases, such as *Clinton v. City of New York* (1998) and *United States v. Nixon* (1974), exhibited the Supreme Court's opposition to bold executive action in areas concerning executive immunity and veto power.<sup>4</sup> These instances demonstrate the fluctuating history of presidential power in the Court, which raises the following question: What factors explain Supreme Court deference to the president? This phenomenon is critical to analyze and understand because of the ability of the Court to influence the public's moral conscience in the United States and its capacity for setting legal precedent. Such precedents have provided ethical and legal guidance in the realm of jurisprudence since the Court's founding in 1789. Thus, the weight of a single judiciary verdict lays a critical hand on the future of democracy in the United States.

Article II, Section 2 of the U.S. Constitution designates the President as the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”<sup>5</sup> Historically, this clause has been interpreted in numerous ways, some of which suggest that this provision gives the Executive particular war powers necessary for a quick response in the interest of preserving national security. Others argue this interpretation is problematic, should this power fall to an impulsive leader or should the breadth of presidential war power extend out of explicit legal language regarding his or her jurisdiction. The ruling calculus—the process by which the Court decides the constitutionality and legality of an issue—of the highest judicial body in the United States, is an integral part of how individual liberties are granted to public officials, and specifically the Commander in Chief; therefore, it is necessary to study elements of the Supreme Court in conjunction with external circumstances in such pivotal cases to better discern the latent influences of the body’s decision-making on the authorization of unilateral action by the president.

I argue that the Supreme Court is more likely to defer to the president both in cases heard during wartime and when justices share political ideology with the president. When a case is heard during wartime, the Court is more likely to defer to the president. Additionally, when individual justices share political ideology with the president, especially when the majority of the Court’s political makeup coincides with the sitting president, the Court is more likely to rule in favor of the president or executive. Results may provide reasons to predict future rulings regarding presidential policy in the context of wartime, but more so regarding political ideology. I test these hypotheses using data from a previous study of federal judicial rulings provided by Howell and Ahmed.<sup>6</sup>

In what follows, I review existing literature regarding cases of executive power in the Supreme Court and address the shortcomings of previous studies. Then, I develop my theoretical argument concerning the decision-making calculus of individual justices when various internal and external circumstances are considered. Following an overview of my research design and data analysis, I present my findings and explore my results. In closing, I review my conclusions and discuss my thoughts for future research.

## 2. Literature Review

The judicial branch exists as the regulatory body of United States law, entrusted with the power to affirm or deny litigants the remedies they seek. Over time, the rulings of the Supreme Court have shown inconsistencies in their deference to the president, specifically in the context of presidential power. When situated within the executive branch, the judiciary retains the ability to invalidate unilateral exercises of presidential power, and thus set the legal precedent for future administrations. In reviewing such cases, the Supreme Court is left with limited direction from the Constitution given the brevity and ambiguity inherent in Article II. Nonetheless, the Court’s decisions have lasting impacts, and many have sought to understand when, why, and whether the Court defers to the president in cases reviewing presidential power. The nature of such decisions is widely debated among legal scholars, who study various external and internal factors of the Supreme Court in search of a pattern.

Since its establishment in 1789, the evolution of Supreme Court decision-making in the context of executive power has become a well-researched phenomenon. Scholars have sought to determine what factors are most indicative of whether the majority will side with the president, including extrajudicial factors, such as wartime, peacetime, and issue salience.<sup>7</sup> Contemporary issues unrelated to the integrity of the Court are important to consider, as historical events may influence the severity and complexity of a given case. The gravity of an issue is heightened in times of war, which some had found is an indication of increased deference to the president.<sup>8</sup>

Other scholars argue that internal characteristics within the Court have a greater influence on decision-making than external factors, including Justice’s party affiliation when compared to the sitting president.<sup>9</sup> Much of this research examines the correlation between shared ideology and deference to the president, finding that Justices are more likely to side with the president when they are of the same party.<sup>10</sup> However, there are some discrepancies in the scholarship about whether the sitting president affects judicial decision-making, more than the president in office when the policy in question was enacted.<sup>11</sup> To this end, it is important to note that this assertion is limited to administrative issues, as many other cases concerning presidential power are under review after unilateral action is taken by the president. More generally, some authors argue a decrease in deference over time, such that increased judicial activism and better quality opposing lawyers can help explain Supreme Court deference to the president.<sup>12</sup>

Further, many scholars have studied the nature of the issue in question and the case outcome, in that the distinction between domestic and foreign affairs appears to have some influence over whether Justices are more likely to rule in favor of the president.<sup>13</sup> Specifically, these findings argue that presidents are less likely to prevail in cases involving domestic affairs rather than foreign affairs. The legislative branch is the elected body that governs the bulk of domestic affairs, as the Constitution leaves a breadth of authority to the executive in handling foreign affairs, including the power to make treaties and receive foreign ambassadors. This framework in the separation of powers suggests that the

exercise of presidential war powers—so long as the action aligns with the constitutional interpretation of executive power in foreign affairs—will be affirmed by the Court.<sup>14</sup> This body of literature lends support to the Two Presidencies thesis, which would argue that the Court defers to the president more often in cases of foreign affairs, rather than domestic.<sup>15</sup>

Much of the existing literature fails to address how *both* internal and external factors can shape the actions of the Court, leading to these ongoing debates. To expand on this, I argue that the external factor of wartime, in conjunction with the internal element of Justice party affiliation in comparison with the president, can explain Supreme Court decision-making on the exercise of presidential power.

### 3. Theoretical Foundations

When legal cases of presidential power reach the Supreme Court, these cases call for careful consideration, as they present some of the most sensitive issues on the breadth of domestic and foreign powers of the presidency. I assume that the Justices of the Supreme Court are ideologically motivated, as their ideology informs their decision-making and constitutional interpretation. Justices are also rational actors of the judiciary, in that they consider the political, societal, economic, and legal implications of a decision. As such, the Court will respond strategically to external factors, such as wartime, which will influence the context by which the Court will consider the domestic and international perception of the case outcome. This rationale suggests that the explicit powers entrusted to the president in the United States Constitution will guide the Court in their review of a case as the primary check on executive power, though individual justice ideology and historical context will factor in, as well.

The president is similar to the justices in that he, too, is motivated by his ideology and wants the case outcome to align with his policy preferences. I argue that the president is partially considering such goals in his exercise of executive power, which suggests that the president will only act unilaterally if there is an incentive to set a legal precedent. However, the president is constrained in doing so, as Congress can counteract the president, and more importantly, the Court can overrule. This will bring the president to be strategic in deciding when to assert his power since it could be brought before the Supreme Court for review.

Building from these assumptions, I argue that justice decision-making on presidential power will be influenced by the inter-branch ideological environment. The justices' ideological motivations will cause them to share policy preferences with presidents of their political party. This can result in ideologically-friendly justices deferring to or siding in favor of a president. Similarly, the president's behavior in acting strategically will cause him to assert his powers boldly when facing a friendly court. Justices are more likely to sympathize with bold decisions and assertions of power in this case, which will encourage the president to move forward in unilateral action. In turn, I hypothesize that:

*H1: Justices are more likely to defer to the president when they share the same party affiliation as the president.*

As mentioned, outside factors can also shape justice decision-making. Through his service as Commander-in-Chief, the president is equipped with political advisors and privileged information regarding war, foreign relations, and national security threats, to which others in government are not privy. Because of this, Congress tends to defer to the president on foreign policy and wartime questions to prevent inter-branch conflicts. The public too tends to increase support for the president and the country in wartime. These dynamics likely also influence the Court and place their wartime decisions on presidential power under greater scrutiny. The interest of national security and maintaining support for the Commander-in-Chief during a crisis will prove advantageous in expanding presidential war powers, as this will cause the Court to view the president's action as necessary. As such, a strategic president will assert power and justices are more likely to defer to the president, as they are cautious in adversely affecting war efforts. A wrong decision could prove harmful to U.S. war victory or threaten the national security of the country. Further, such an unfavorable outcome may hurt the Court's legitimacy, which sets an alarming precedent. As such, I hypothesize that:

*H2: Justices on the Supreme Court are more likely to side with the president in cases heard during wartime.*

## 4. Research Design

### 4.1 Justice-Level

To test my hypotheses of interest, I take a quantitative approach. I test my hypotheses on justice decision-making in Supreme Court cases over presidential power between the years 1933 and 2008. The unit of analysis is the justice-case, and I conducted my analysis using data made available by Howell and Ahmed.<sup>16</sup> They collected data on all cases in that time range which explicitly named the US government, a member of the president's cabinet, or the president as a party. The Howell and Ahmed dataset originally included about 19,500 justice votes on 2200 cases. I, however, only analyze a subset of cases where the Solicitor General himself or herself argued the case on behalf of the government. Thus, my analysis is on 2558 justice votes on 301 cases. This is a critical faction to study, as many scholars note the Solicitor General rarely argues cases personally, and only does so when the matter is of particular importance to the sitting president. Howell and Ahmed note these case's increased media presence is indicative of higher issue salience to the public; moreover, former Solicitors General have spoken publicly on their position as a lawyer representing the president's interest alone, not as an agent of the people.<sup>17</sup> As such, I choose to analyze these cases as they are those for which we may expect the most judicial deference to the president.

In this analysis, the unit of analysis is justice-case. The dependent variable is represented by a dummy variable for whether or not a justice voted in favor of the president (or government) in a case. It is coded as a 1 if the justice voted in favor and 0 if the justice did not. In total, justice votes showed 1274 (49.8%) in favor of the president and 1284 (50.2%) votes against. This summary shows only a 10 vote difference between the two.

For Hypothesis 1, the main independent variable is whether the president and the justice agree ideologically. This variable is coded as a 1 if the justice was appointed by a president of the same party as the president at the time of the decision, and coded as a 0 otherwise. The data showed 1426 (55.7%) votes from a justice appointed by a president of the same party as the sitting president, and 1132 (44.3%) votes from justices appointed by the opposing party as the sitting president.

For Hypothesis 2, the main independent variable is whether the case was decided during wartime. This is coded as a 1 if yes; 0 if no. Howell and Ahmed include the following wars in their dataset, which I also use: World War II (December 7, 1941 to August 14, 1945), Korea (June 27, 1950 to July 27, 1953), Vietnam (February 7, 1965 to January 27, 1973), the Gulf War (January 16, 1991 to April 11, 1991), and post-9/11 (October 7, 2001 to December 31, 2007).<sup>18</sup> Many past scholars have included these same wars in their analyses, as these periods greatly impacted United States history regarding the executive, including the post-9/11 era concerning the Middle East. In total, 903 (35.3%) votes were cast during a given wartime period, and 1655 (64.7%) were otherwise cast in peacetime.

The control variables in my analysis include issues of constitutionality, federal law, and economics, and the presence of amicus briefs in a case. These variables may affect whether a justice votes for the president or not, as different issues at stake may influence a justice's interpretation of the law regarding future implications. I first controlled for constitutional issues because these are generally higher stakes and salient decisions. Also, given the broad grant of executive power in Article II, this could affect how justices decide these cases. If the case involved a constitutional issue, the case was coded as a 1 if yes, and 0 otherwise. The data included 935 (36.6%) votes in cases dealing with a constitutional issue and 1623 (63.4%) that did not. I also control for statutory decisions, since these often pit the president and Congress against each other. Cases regarding the statutory interpretation of a federal law were coded as a 1 if yes, and as a 0 otherwise. Of this control, 1411 (55.2%) votes were coded as issues of federal law, and 1147 (44.8%) votes indicated otherwise.

I also controlled for economic issues because the president has influence over the economy regarding fiscal policy.<sup>19</sup> Thus, justices may be more likely to defer on these cases. If the case dealt with an economic issue, the case was coded as a 1 if yes, 0 if no. In total, there were 488 (19.1%) votes in cases concerning economic issues and 2070 (80.9%) otherwise. My final control is a measure of the number of amicus briefs filed in favor of the government in a case. Amicus briefs are filed by outside parties who have an interest in the outcome of the case and want to provide the Court with more information. These briefs are a good signal of the importance of the case. I expect that when more are filed in favor of the government, justices are more likely to defer. The variable is coded as the difference between amicus briefs for and against the government in a given case. Positive numbers mean that more pro-government briefs were filed relative to anti-government briefs. Negative numbers indicate the opposite. The variable ranges from -7 to 26, with an average of -0.09 briefs per case.

## 4.2 Court-Level

In gathering justice-level data, I chose to conduct a secondary analysis at the court-level to determine whether the political ideology of the Court's majority is more indicative than individual justice ideology in predicting whether or not the president is likely to win a case. My hypotheses remain the same but apply to the Court's majority rather than individual justices. After condensing the individual justice votes in the Howell and Ahmed data, the unit of analysis becomes the case. The dependent variable is whether or not the president (or government) wins in a case, represented by a dummy variable of 1 if the Court defers to the president; 0 if not. The main independent variable is represented by a dummy variable for whether or not the majority of justices agree ideologically with the sitting president. Howell and Ahmed's initial models included an indicator variable for whether the Justice was appointed by a president of the same party as the sitting president.<sup>20</sup> This is coded as a 1 if the majority of the Court and the president are of the same political party, and as a 0 otherwise. In total, 181 out of 301 cases show the president and the majority agree ideologically. This equates to approximately 60% of cases heard before the Court in which the president and majority of justices are of the same party.

The control variables are categorized by issue type, including constitutionality, federal statutes, and economic issues, and the external variable of wartime—identical to the justice-level data absent amicus briefs. Each variable is coded as a 1 if the case considers one or more issues, and as a 0 if the case does not consider an issue. Some cases review one issue in question while others consider multiple. In total, 108 (35.9%) cases occur during wartime, 108 (35.9%) cases involve constitutionality, 168 (55.8%) cases review federal statutes, and 59 (19.6) cases involve an economic issue. Of the 443 issues in question, the Court defers to the president in 289 (65.2%) issue instances, and the majority of justices agree ideologically with the president on 204 (46%) occasions.

The Court deferred to the president in 194 (64.5%) out of 301 cases, of which 131 (43.5%) cases included shared political ideology between the majority of justices and the president. In cases in which the president and the majority Court share political ideology, the president won 75% of the cases during wartime; 81% of cases regarding constitutional issues; 60% of federal statute cases; and 73% of cases regarding economic issues.

## 5. Analysis

I conducted two regression analyses to test my hypotheses of interest. The results are displayed in Table 1 and Table 2. Hypothesis 1 of the Justice-Level analysis predicted that justices are more likely to defer to the president when they share the same party affiliation as the president. The coefficient on the ideology variable in Table 1 supports this claim. Shared ideology between an individual justice and the sitting president has a positive effect, indicating that justices are more likely to vote in favor of the president or government party in a case if there exists a shared political ideology. If the justice and the president have a shared political ideology, the probability that the justice will vote in favor of the president increases by 0.053 or about 5.3%.

Hypothesis 2 of the Justice-Level analysis predicted that justices are more likely to side with the president in cases heard during wartime. The coefficient of the variable in Table 1 shows support for this assertion. There is a positive effect, showing that wartime increases the probability that a president will win the case. If the case in question occurs during wartime, we expect a 4.2% increase in the probability that a justice will defer to the president.

Table 1. Justice-level regression results

<i>Variable</i>	<i>Coefficient</i>	<i>Standard Error</i>
Intercept	0.427	0.036
Wartime	0.042	0.021
Constitutional Issue	-0.012	0.038
Federal Statutory Issue	0.063	0.037

Amicus Brief Difference	-0.008	0.004
Economic Issue	-0.019	0.025
Justice shares President's Ideology	0.053	0.020

The directions for the coefficients are as predicted for the Wartime and Ideology variable. The direction of the Amicus Brief control is not as I anticipated. These directions support my hypotheses.

At the Court-Level analysis, Hypothesis 1 is shown by the coefficient in Table 2. The positive coefficient indicates that the president is 16.8% more likely to win a case if the majority of the Supreme Court shares political ideology with the president. As such, this coefficient lends support to my hypothesis at both the Justice and Court-Level.

The Court-Level analysis of Hypothesis 2 is supported as well, though only slightly, as shown by the coefficient on this variable in Table 2. During wartime, the Court is 0.9% more likely to defer to the president rather than in peacetime. While this is not a large effect, the coefficient is positive and in the anticipated direction.

Table 2. Court-level regression results

Variable	Coefficient	Standard Error
Intercept	0.498	0.100
Wartime	0.009	0.058
Constitutional Issue	-0.011	0.107
Federal Statutory Issue	0.037	0.101
Amicus Brief Difference	-0.012	0.011
Economic Issue	-0.046	0.070
Majority of judges share President's ideology	0.168	0.061

The directions for the coefficients are as predicted for the Wartime and Ideology variable. The direction of the Amicus Brief control is not as I anticipated. These directions support my hypotheses.

In terms of control variables, there is a slight decrease in the probability of deference to the president regarding constitutional and economic issues at both the Justice and Court-Levels, and justices are less likely to defer to the president on these matters. This is indicated by the negative coefficient on the respective variables. The amicus brief difference is also negative at the Justice and Court-Levels, showing that the presence of amicus briefs produces a slight decrease in the probability of deference to the president. The only control variable with a positive coefficient is shown in cases regarding federal statutes. This result is found in both regressions, indicating that the presence of a federal statutory issue in a case increases the probability of deference to the president by an individual justice and the majority.

As shown by the relatively large standard error of the constitutional (0.11), federal statutory (0.10), and economic (0.07) variables, the effects are not statistically significant at the Court-Level analysis. The federal statute variable is statistically significant at the Justice-Level, as the 90% confidence interval is positive at both the lower and upper bounds. This finding suggests that we can reject the null hypothesis, as the presence of a federal statutory issue at the Justice-Level indicates a positive effect on the probability of deference to the president.

The effect of amicus briefs is not in the anticipated direction in either regression, as the net number of amicus briefs filed in favor of the government's position actually decreases the likelihood of deference to the president. The negative coefficient suggests that as the difference swings into the government's favor, the court is less likely to defer to the

president. This could be the result of justices growing frustrated with third-party input on a given case, causing the increase in amicus briefs to decrease judicial deference to the president.

The control variables at large are not statistically or substantively significant in either regression; however, the direction of the effects is consistent at both the Justice and Court-Level. As such, this suggests consistency of the variables regarding an increase or decrease in the probability of deference to the president at both the Justice and Court-Level for all variables.

I find statistical and substantive significance for the ideology variable at the Justice-Level, as the coefficient equates to a sizable 5.3%. I also find the majority party variable is statistically and substantively significant, as the positive coefficient shows that the Court is 16.8% more likely to defer to the president than a non-Copartisan majority. This effect is large, substantively speaking, and the majority party variable is the largest numerical indicator of the probability that the Court will defer to the president. The wartime and ideology variable at the Justice-Level, and the wartime and majority ideology variable at the Court-Level are in the anticipated positive direction. Further, the 90% and 95% confidence intervals are positive for both the wartime and ideology variables in both analyses. As such, these variables are statistically significant in that we can distinguish the effect from a zero effect.

## 6. Conclusion

I expected to find an increase in deference to the president in cases heard during wartime and in cases where the president and justice, or majority of justices, shared political ideology. The results of my analyses were as expected, and findings suggest that individual justices are more likely to defer to the president when sharing political ideology. This expectation showed an even greater effect at the Court-level, showing a large increase in the likelihood that the majority of the Court will defer to the president when the president and the majority are of the same political party. There was an increase in probability of deference to the president during wartime, as expected, though the Court-level analysis suggested a lower probability than at the Justice-level. The economic and amicus brief control variables were not in the anticipated directions, as I found a decrease in the probability of deference to the president in both of these cases.

These findings offer several possible explanations for Supreme Court decision-making on the basis of political ideology and wartime. An increase in deference to the president during wartime suggests that the president is more likely to be successful in expanding executive powers if the case is heard during a period of war, which could present negative implications for the balance of power between the branches of government. Regarding political ideology, the Court is more likely to defer to the president if there exists a shared ideology between an individual justice and the president, and a greater possibility if the majority agrees ideologically with the president as well. In practice, there is a compounded effect in the increase of probability in deference to the president when the combined ideology of the individual justices reaches majority proportions on the Court.

The Supreme Court was founded in 1789, yet the findings of this study are confined to the years between 1933 and 2008. Moreover, the dataset was narrowed to cases in which the Solicitor General personally argued on behalf of the government. Theoretically, the possible narratives to explain judicial decision-making could be influenced by several other factors and variables neglected by this study. These limitations suggest that my findings are applicable to only a subset of cases regarding the president and the use of executive power in the Supreme Court.

While my findings render a compelling narrative to explain judicial decision-making concerning the president, the results provide areas for future research. The variables should be applied to a wider data-set, including cases in which the Solicitor General is not involved, and in cases before 1933 and after 2008. In addition, the amicus brief variable presents a possible study to investigate the greater effect of amicus briefs on judicial decision-making.

Understanding the judicial decision-making calculus of the Supreme Court unlocks an expansive field of knowledge for the president to use to advance executive power. That being said, the president would be wise to exercise unilateral power when the odds are in his—and one day her—favor.

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